Supreme Court, U.S.
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In The

Supreme Court of the United States

Curtis K. Johnson, *Petitioner*

v.

Buffalo Police Department, *Respondent*

On Petition For Writ of Certiorari to the Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Curtis K. Johnson, *Pro Se*
153 Donaldson Road
Buffalo, New York 14208
716-882-1442

HOPP

uestions Presented For Review

Can events that are directly related to the termination event be time barred by the 300-day rule for Plaintiff and still be used by the Defendant as a defense of action?

Should Summary Judgment be granted in light of conflicting evidence?

When do rule changes become affective to a case to make the rule enforceable upon said case?

Parties to Proceeding:

Petitioner:

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Respondent:

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Statement of Jurisdiction:

Case filed on August 28, 1998, **Docket # 98cv 543**
United States District Court
Western district of New York
Buffalo, New York

- Hon. John T. Curtin, District Court Judge, Presiding

United States Court of Appeals
For the Second Circuit, **Docket # 02-7105**
Presiding:

- Hon. Thomas J. Miskill,
- Hon. Richard J. Cardamone,
- Hon. Chester J. Straub,

Circuit Judges

The Court of Appeals entered its opinion on September 6, 2002 and subsequently denied a Petition for Rehearing on January 14, 2003. Petitioner therefore submits this Writ of Certiorari to the United States Supreme Court.

Statement of the Case

Statement of facts:

Plaintiff, Curtis K. Johnson, was sworn as a member of the Buffalo Police Department on March 1, 1988. On March 17, 1995, Plaintiff's employment was terminated. The reason given by the Defendant, Buffalo Police Department, was the theft of Plaintiff's gun and bulletproof vest. These thefts occurred as follows: on May 5, 1989, Plaintiff's apartment was broken into and stolen along with other items was a Smith & Wesson .357 Magnum revolver; on May 4, 1993, while visiting a friend in Rochester, New York, my vehicle was stolen which had my bullet proof vest in the back; on October 20, 1993, my cousin broke into my house and stole my gun (the same one that had been previously stolen in 1989 and recovered-which

has been recovered again and is in the possession of a friend pending the total outcome of this case); and on May 19, 1994, while in my home working in my recording studio Tony Mitchell took a detour from his bathroom trip and stole my vest from my bedroom. Though each of these thefts were reported properly and were not proven to be falsely reported incidents, the Defendant alleged that Plaintiff was not conducting himself as should a member of the Buffalo Police Department and terminated Plaintiff's employment.

Statement of Proceedings and Dispositions:

Subsequently, Plaintiff filed a complaint with the New York State Division for Human Rights, alleging discriminatory practices in the discipline and termination of Plaintiff. The NYSDHR forwarded the results of its investigation to the EEOC, who then sent out a "Determination Letter." Plaintiff at the time was being represented by the law firm of Seigal, Keleher, & Kahn. However, due to the delay in filing Plaintiff filed the case Pro Se on August 28, 1998. On June 9, 1999, Defendant submitted an Answer to Complaint, Interrogatories, Notice of Deposition, and Return of Service notice. July 14, 1999, Plaintiff submitted an Answer to Defendants First Set of Interrogatories. In a meeting held in Judge Curtin's chambers on August 16, 1999, a meeting was scheduled for September 10, 1999 to allow Plaintiff to advise attorney. Though on that day Roger Doyle of Seigal, Keleher, & Kahn told Plaintiff that he would take the case from here and would call the Corporation Council and schedule a new date, he did not and the case was dismissed on April 26, 2000 for failure to proceed. On May 1, 2000, Plaintiff filed a Motion to Reconsider. In a meeting held on September 8, 2000, Judge Curtin ordered Defendant to file a Motion for Summary Judgment. Case was reopened on September 14, 2000. On January 5, 2001, Defendant filed a Motion for Summary Judgment. April 20, 2001, Plaintiff filed an Answer. In

response to Plaintiff's Answer, Defendant filed a Supplemental Memorandum of Law and Affidavit of Alexander Montalvo (Detective, Professional Standards Division), May 16, 2001. On July 16, 2001, Plaintiff's complaint was dismissed in an order signed by USDJ John T. Curtin. The case was closed on July 17, 2001. July 25, 2001 Plaintiff filed Motion to Reconsider, Memorandum of Law, Statement of Facts, Request for Production of Documents, Interrogatories, Deposition Request, Affidavit of Keith Tisdale (suspect in the theft of Plaintiff's gun), and an Affidavit of Service. August 15, 2001 Plaintiff filed a Notice of Appeal. After the clearing of some confusion Plaintiff filed another Notice of Appeal on January 17, 2002. August 28, 2002 Plaintiff appeared before the United States Court of Appeals for the Second Circuit for oral arguments. Defendant rested on Submission. On September 6, 2002 the Appellate Court affirmed the District Court's decision. Plaintiff subsequently filed a Petition for Rehearing with the Appellate Court. This Petition was denied on January 14, 2003. In keeping with the schedule of timeliness, Plaintiff now respectfully submits this Writ of Certiorari.

Reasons for Granting the Writ

Plaintiff hereby petitions this Court on the following bases:

1. In the original complaint filed August 28, 1998, by Plaintiff, there were several events that were listed as being discriminatory acts. Most of these events were departmental charges served upon Plaintiff by Defendant. As such, these events were listed in the employment record. This record is of the Internal Affairs Division of the Buffalo Police Department discipline record. As justification for the termination of Plaintiff's employment, Defendant asserted that in addition to the theft of Plaintiff's gun and bulletproof vests, this disciplinary record played a role in the decision to terminate

employment. Defendant also asserted that the complaint of these events were time barred by the 300-day rule of Title VII. Some of the events mentioned are time barred, as they were not associated with the decision to terminate plaintiff. However, the events that are a part of the employment record of Plaintiff are not time barred because they directly relate to the termination. The U.S. Court of Appeals For The Second Circuit, in the case of **Karen Van Zant v. KLM Royal Dutch Airlines, USCA 2nd Cir., Docket # 95-7032,** stated **"Former employee's Title VII cause of action was time barred, except to the extent that it related to events which occurred within 300 days of her filing of charge of discrimination."** This same court has decided differently in this case. In this case Defendant submitted an employment record containing the exact same events as found in Plaintiff's complaint and asserted that these events helped to justify the termination. This assertion makes the events that the lower courts have viewed as time barred, part of the event that is not time barred. This assertion is repeated in **the decision of both the District Court and the Appeals Court(See Appendix).**

2. In the proceedings of this case, both Plaintiff and Defendant submitted evidence in support of their sides. There are some evidentiary submissions that are in conflict with each other. Firstly, Defendant submitted affidavits and statements that asserted that Police Commissioner R. Gil Kerlikowski based his decision to terminate Plaintiff's employment on the outcome of the Formal Hearing held on November 3, 1994. However, Plaintiff has submitted evidence that controverts this assertion. The evidence in question is the transcript from the Informal Hearing held February 17, 1994. This hearing was held eight months prior to the Formal Hearing. In this transcript Police Commissioner R. Gil Kerlikowski is quoted as

saying "...and I am going to move for termination at the Formal Hearing {which had not yet been scheduled} of your employment..." **[Exhibit P64].** This transcript clearly shows that the assertion of the Defendant that Commissioner Kerlikowski based his decision on the outcome of the Formal Hearing is not true. Additionally, Plaintiff submitted other documents from the employment file maintained by Defendant. These documents contained statements made by supervising officers to the commanding officers, which set out recommendations for unwarranted termination and discipline. No objection was submitted by the Defendant as to the merit of this evidence, which is contained in Plaintiff's employment file **[Exhibits: P28, P29, P38, P39] Associated Press v. U.S., 1945, 65 S.Ct. 1416, 1418, 326 U.S. 1, 6, 89 L.Ed. 2013; International Assc,n of Machinists & Aerospace Workers, Dist. No. 8, AFL-CIO v. J. L. Clark Co., C. A. 7th, 1972 471 F.2d 694; Johnson v. Weinberger, D.C. Colo. 1974, 388 F. Supp. 231; Bankers Trust Co. v. Transamerica Title Ins. Co., C. A. 10th 1979,594 F.2d 231; Hayes v. Cape Henlopen School Distr., D. C. Del. 1972, 341 F. Supp. 823; Fuller v. Aetna Cas. & Sur. Co., D.C. Miss. 1974, 369 F.Supp. 967;**

In both the District Court and Appellate Court's decisions, great weight was given and continued reference made to the opinion of the Formal Hearing Officer, Samuel Cugalj. In his Post Hearing Brief, Mr. Cugalj gave his opinion about the storage and safety of firearms. These opinions were not based on any evidence or testimony that was presented at that hearing. These were instead his personal opinions. **[United States v. George(1985, CA10 NM) 778 F2d 556, 19 Fed Rules Evid Serv 1141; United States v. Marabelles (1984, CA9 Hawaii) 724 F2d 1374, 1381-1382, 14 Fed Rules Evid Serv 1551]** Mr. Cugalj is not a firearm expert nor has he quoted the opinion of anyone that is a firearm expert in making his judgment. **[Dixon v. International Harvester Co. (1985, CA5 Miss) 754 F2d 573,**

580, 17 Fed Rules Evid Serv837] Mr. Cugalj, by practice and experience, may be a very knowledgeable person on the subject of employment hearings and laws governing such. However, he has no expertise in the field of firearms but opinions which have been held as expert. **[Garnac Grain Co. Inc., v. Blakely (1991, CA8 Mo) 932 F2d 1563, 1567; McCullock v. H.B. Fuller Co. (1992, CA2 Vt) 981 F2d 656, 657, 37 Fed Riles Evid Serv 767; Andrews v. Metro N. C. R. Co. (1989, CA2 Conn) 882 F2d 705, 707-709, 28 Fed Rules Evid Serv 1044; FTC v. Amy Travel Service Inc., (1989, CA7 Ill) 875 F3d 564, 572-573, 27 Fed Rules Evid Serv 1214, 13 FR Serv 3d 1088; United States v. West (1982, CA7 Ill) 670 F2d 675, 682-683, 10 Fed Rules Serv 725; Rimer v. Rockwell International Corp. (1981, CA6 Ohio) 641 F2d 450, 456; United States v. Lopez (1976, CA5 Ga) 543 F2d 1156, 1158, 2 Fed Rules Evid Serv 252]** There was evidence submitted by Plaintiff **[Exhibit P2]**, which contained the testimony of Lieutenant Robert Megan. At the time of his testimony, he was a 21-year veteran of the Buffalo Police Department. He also was the President of the Buffalo Police Benevolent Association, the union which represents Buffalo Police Officers. His experience and training qualifies him as an expert witness. **[Lavespere v. Niagara Maach. & Tool Works, Inc.(1990, CA5 La) 910 F2d 167, 175-177, 30 Fed Rules Evid Serv 1171, 17 FR Serv 3d 654; American Technology Resources v. United States (1990, CA3 Pa) 893 F2d 651, 656, 29 Fed Rules Evid Serv 890; Dawsey v. Olin Corp. (1986, CA5 La) 782 F2d 1254, 1262; United States v. Portis (1976, CA7 Ill) 542 F2d 414, 420]** Lt. Megan's testimony directly controverts the opinion of the Defendant as well as the hearing officer. Lt. Megan testified that Plaintiff's handling of and storage of his gun was in keeping with the practices of the rest of the officers on the Buffalo Police department, himself included. The District and Appellate Court disregarded this evidence in making their decisions. **[Friendship Heights Associates v. Vlastimil Koubeck,**

A.I. A. (1986, CA4 Md) 785 F2d 1154, 1159-1160, 19 Fed Rules Evid Serv 1611]

3. Effective December 1, 2000, Rule 26 of the Federal Rules of civil Procedure was amended in several significant respects. Because the amended Rule 26 conflicted to some degree with Rule 26 of the Local Rules of Civil Procedure for the Western District of New York, adopted December 1, 1994, local Rule 26 was rescinded in all respects. This order, given by David G. Larimer, Chief Judge, United States District Court, was dated May 1, 2001. On May 16, 2001, Defendant submitted Supplemental Memorandum of Law & Affidavit of Alexander Mantalvo. Defendant neglected to submit any documents in reply to Plaintiff's Answer/Response and Aswer/Detailed Response submitted April 20, 2001. The Local Rule 26 was still ineefect when Plaintiff submitted the Answer to Defendant's Motion for Summary judgment (submitted January 5, 2001). However, the Local Rule 26 did not govern discovery after the May 1, 2001 notification was sent out to the District Courts. Therefore, Defendant should've followed the dictates of the National Rule 26 in regards to voluntarily submitting documents referred to in the Plaintiff's Answer. **[Federal Rules of Civil Procedure, Rule 26(a)(1)]**

Conclusion

In conclusion, Plaintiff-Appellant, wishes the Court to grant this Writ of Certiorari for the above outlined reasons to the ends of justice served.

Respectfully Submitted,

Curtis K. Johnson, Plaintiff-Appellant, Pro Se
153 Donaldson Rd., Buffalo, N. Y. 14208

Appendix:

United States District Court

Western District of New York

Curtis K. Johnson, Plaintiff

Vs 98-CV-0543C(M)

Buffalo Police Department, Defendant

Decision

And

Order

CURTIN, DISTRICT JUDGE

APPEAEANCES: PLAINTIFF PRO SE,
MICHAEL B. RISMAN, ESQ.,
CORPORATION COUNSEL OF THE
CITY OF BUFFALO (RICHARD
BENITEZ, ESQ., ASSISTANT
CORPORATION COUNSEL, OF
COUNSEL), BUFFALO, NY 14202

BACKGROUND

ON August 28, 1998, Plaintiff Curtis K. Johnson ("Johnson"), an African-American male, filed this Title VII action pro se, alleging that the Buffalo Police Department ("BPD") discriminated against him based on race and color and terminated him from his employment. Item 1. Defendant City of Buffalo ("the City") answered; and after a brief period of discovery, it filed a motion for summary judgment. Item 18. Johnson submitted an "Answer to Motion for Summary Judgment," Item25, and an "Answer to Motion for Summary Judgment Detailed Response" ("Detailed Response"). Item 26. The City replied. Items 28,29. Oral argument on the motion was held on June 27, 2001. For the reasons that follow, the court grants the City's motion for summary judgment.

FACTS

The City submitted a Statement of Facts pursuant to Rule 56 of the Local Rules of Civil Procedure. Plaintiff did not submit such a statement,[1] although in his "Detailed

[1] Inasmuch as Johnson failed to submit an opposing statement of material facts as to which it is contended that there exists a genuine issue to be tried, the facts contained in the City's statement are deemed admitted unless otherwise adequately controverted in the

Response" he addressed the City's assertions. Item 26, p. 4. For the most part, the facts in this case are uncontested.

Johnson was appointed as a Buffalo police Officer on March 1, 1988, and was terminated on March 17, 1995. As grounds for his termination, the City points to disciplinary charges preferred against Johnson, namely, a violation of BPD rules and regulations: (1) IAD #93-348, concerning his failure to secure his weapon while off duty on October 20, 1993, whereupon it was stolen. This was the second time Johnson's weapon had been stolen (the first occurrence being in 1989); and (2) IAD # 94-165, concerning failure to secure his bulletproof vest, by having it stolen from his home on May 19, 1994. Item 18, Ex. D. this was the second time his bullet proof vest had been stolen as well (the first occurrence being in 1993). In his "Detailed Response," plaintiff, referring to the 93-348 Departmental charges, asserted that he "disagrees with and disputes several issues in this document." Item 26, p. 3.

An impartial hearing officer, Samuel Cugalj, was appointed by both plaintiff, through his union's legal counsel, and the City of Buffalo, to review the charges. Mr. Cugalg

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record. However, this court is mindful that *pro se* litigants are held to less stringent standards than are litigants who are represented by

rendered a discussion and recommendation on March 15, 1995 that "THE DEFENDANT's continuing pattern of Departmental violations warrants his termination from the Police Department." Item 18, Ex. G, p. 15. Police Commissioner R. Gil Kerlikowski reviewed the hearing officer's recommendation. At a hearing held in his office on March 17, 1995, he terminated Johnson from the Buffalo Police Department. Item 18, Ex. F.

On June 9, 1995, Johnson filed a complaint with the New York State division of Human Rights ("DHR") against the Police Department, charging that the BPD had denied him equal terms, conditions, and privileges of employment in violation of the Human Rights Law of New York State. In his complaint, Johnson enumerated numerous acts of allegedly unlawful discriminatory practices perpetrated against him on the basis of his race, including use of racial epithets, exposure to white supremacists literature, transfer to less desirable assignments, and being subjected to discipline for actions for which White officers were not disciplined, culminating in his termination. He asserted that White officers with similar or more egregious disciplinary accusations were not disciplined.

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counsel. Ortiz v. Cornetta, 867 F. 2d 146, 148 (2d Cir. 1989).

The complaint also charged violations of Title VII of the Civil Rights Act of 1964 and authorized the DHR to accept the complaint on behalf of the Equal Employment Opportunity Commission (EEOC). Item 18, Ex. B. The record does not reveal when the DHR terminated its investigation, or when the DHR complaint was transferred or filed with the EEOC. However, the City does not contest this point. The next item in the record is the EEOC right-to-sue letter, dated June 3, 1998, which found that "the evidence obtained during the investigation [examining the DHR findings and record presented] does not establish violations of the statutes." Item 18, Ex. A.

Johnson filed his federal court complaint on August 28, 1998, challenging the City's termination of his employment. The complaint cites 16 dates when the acts of alleged discrimination occurred, including one day 1990, nine days in 1991, three days in 1993, two days in 1994, and 0ne day (the day of termination) in 1995. Item 1, p. 2.

DISCUSSION

I. Standard for Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In making this decision, "all ambiguities must be resolved and all inferences drawn in favor of the party against whom summary judgment is sought." Gallo v. Prudential Residential Services, 22 F. 3d 1219, 1223 (2d Cir. 1994) (citation omitted). "A party who moves for summary judgment has the burden of showing that no genuine issue of material fact exists and that the undisputed facts entitle it to judgment as a matter of law." Rule v. Brine, Inc., 85 F. 3d 1001, 1011 (2d. Cir. 1996). The "mere existence of a scintilla of evidence" supporting the non-movant's case is insufficient to defeat a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The non-moving party may not rest upon unsubstantiated allegations, conclusory assertions, or mere denials of the adverse party's pleading, but must set forth and establish specific facts showing that there is a genuine issue of fact for trial. Fed. R. Civ. P. 56(e).

II. Assertions by the Parties

Other than plaintiff's allegation of discriminatory job termination, the City argues that Johnson failed to timely file

his allegations of discrimination, pursuant to the requirements of Title VII. Those allegations are thus outside of the statutory time period and are precluded by law. The City also claims that the "continuing violation" doctrine would not apply to extend the statute of limitations. As to Johnson's remaining job termination allegation, the City argues that it had a legitimate, non-discriminatory purpose for its adverse employment action; and therefore, summary judgment should be granted in its favor.

Johnson disputes the City's timeliness argument, asserting that the defendant refers to events prior to the 300-day statutory period to make its argument; he disputes the impartiality of Cugalj, the hearing officer on his case; and he claims that the City's assertion that there was a legitimate reason for his termination was false, as the BPD selectively enforced rules, which had a disparate and discriminatory effect on him and other African-American officers, and that Cugalj did not assess all the facts when coming to his disposition.

III. Application

A. Timeliness of Filing

The City's first argument is that the allegations contained in the complaint dating to 1990, 1991, 1993, and 1994 are time-barred. Title VII requires a claimant to file a discrimination charge with the EEOC within 300 days of the alleged unlawful employment

Discrimination charge with the EEOC within 300 days of the alleged unlawful employment action or, if the claimant has already filed the charge with a state or local equal employment agency, within 300 days of the alleged act of discrimination. Quinn v. Green Tree Credit Corp., 159 F. 3d 759, 765 (2d. Cir. 1998), citing 42 U.S.C. ~2000e-5(e) (1); Van Zant v. KLM Royal Dutch Ailines, 80 F.. 3d 708, 712 (2d Cir. 1996. This requirement functions as a statute of limitations, "in that discriminatory incidents not timely charged before the EEOC will be time-barred upon the plaintiff's suit in district court." Quinn, 159 F.3d at 765.

Because Johnson filed his race discrimination charge with the DHR on June 15, 1994, his Title VII cause of action would normally include any incidents alleged to have occurred in the proceeding 300-day period. Any incidents

alleged to have occurred prior to August 13, 1994 would be time barred under Title VII.

Although the City has estimated the date beyond which allegations of discrimination are time-barred differently (October 12, 1994),[2] the result is the same: only the March 17, 1995 termination remains, and the other dates of discriminatory practices alleged by plaintiff as taking place in 1990, 1991, 1993, and 1994 are precluded as a matter of law.

B. Continuing Violations

Although plaintiff did not specifically plead that a continuing violation of his rights took place so as to extend the limitations period for claims of discriminatory acts, the City, liberally reading Johnson's *pro se* answer, submitted an argument addressing this point. As a preliminary matter, "[t]he courts of this circuit consistently have looked unfavorably on continuing violation arguments." Blesedell v. Mobil Oil Co., 708 F. Supp. 1408, 1415 (S.D.N.Y. 1989). "Indeed, only 'compelling circumstances' will warrant

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[2] The City has apparently misapplied the statute of limitations provisions in 42 U.S.C. ~2000e-5 by reducing the 300 day limit to 240 days by subtracting the initial 60 days that the DHR is supposed to have exclusive jurisdiction over the Title VII claims in a deferral state, which New York is, under 42 U.S.C.~2000e-5(e)(1).

application of the exception to the statute of limitations." Id., citing LaBeach v. Nestle Co., 658 F.Supp. 676, 687 (S.D.N.Y. 1987).

A continuing violation may be found "where there is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted buy the employer to continue unremedied for so long as to amount to a discriminatory policy or practice." Quinn, 159 F. 3d at 766 (quoting Cornwell v. Robinson, 23 F. 3d 694, 704 (2d Cir. 1994). However, when the acts outside the limitations period are not continuous in time with one another or with the timely acts alleged, this discontinuity is fatal to the continuing violation argument. Quinn, 159 F.3d at 766. Further, the "continuing violation exception applies when there is evidence of an ongoing discriminatory policy or practice, such as use of discriminatory seniority lists or employment tests." Vzn Zant, 80 F.3d at 713.

In this case, the majority of discriminatory acts (10 of 16) are alleged to have occurred in 1990 and 1991, and none in 1992. Three acts occurred in 1993, two in 1994, and only one, the termination, in 1995. These scattered alleged instances do not

warrant application of the continuing violation exception: the alleged acts sufficiently isolated in time as to break the necessary continuum of discrimination. Nor has plaintiff alleged a connection between the BPD's treatment of him and any specific policy or practice. Thus, the continuing violation exception is not applicable in this case.

C. **Was plaintiff's termination discriminatory?**

In a Title VII employment discrimination case, the burden plaintiff bears in proving discriminatory discharge follows the burden-shifting analysis of McDonnell-Douglas v. Green, 411 U.S. 792 (1973). Under that test, the plaintiff must first prove "by the preponderance of the evidence a prima facie case of discrimination." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-253 (1981). Should the plaintiff meet this prima facie burden, the burden then shifts to the defendant to provide a legitimate, nondiscriminatory reason for the termination. Finally, the burden shifts back to the employee to show that the defendant's stated reasons are merely a pretext for discrimination. In order to prevail, the plaintiff must ultimately show that discrimination played a motivating role in, or contributed to, the employer's decision. St.Mary's Honor Center v. Hicks, 509 U.S. 502, 514-15 (1993).

Many courts have totally dispensed with the "much criticized minuet or burden shifting analysis of McDonnell-Douglas Corp." and have simply conceded in the abstract the existence of a prima facie case in order to promote expeditious resolution of the issues presented by plaintiff's claims. Fierro v. Saks Fith Avenue, 13 F. Supp. 2d 481, 488 (S.D.N.Y. 1998).

1. Prima Facie Case

In order to establish a prima facie case of discriminatory termination, the plaintiff must show (1) that he belonged to a protected class; (2) that he was performing his duties satisfactorily; (3) that he was discharged; (4) and that the circumstances under which he was discharged give rise to an inference of discrimination. Chambers v. TRM Copy Ctrs. Corp., 43 F. 3d 29, 37 (2d Cir. 1994). The burden of establishing a prima facie case is not a heavy one. Certainly, there is no question that plaintiff meets the first and third prima facie requirements. As to the second requirement, despite the fact that plaintiff had numerous citations filed against him, he still performed his duties, and no evidence has been provided by the City to show negative performance evaluations. As to the fourth requirement, the Second Circuit has described the appropriate summary judgment inquiry as follows:

Since the court, in deciding a motion for summary judgment, is not to resolve

Issues of fact, its determination with respect to the circumstances that give rise

To an inference of discrimination must be a determination of whether the

Proffered admissible evidence shows circumstances that would be sufficient

to permit a rational finder of fact to infer a discriminatory motive.

McLee v. Chrysler Corp., 109 F. 3d 130, 135 (2d Cir. 1997).

Here, there is evidence in the record tending to show that African-American officers nay have been disciplined more harshly for failure to secure their weapons and bullet proof vests than White officers. The City submitted an affidavit by Detective Montalvo, which includes a list of disciplinary charges against police officers who have lost weapons and/or vests prior to the disciplinary charges preferred against plaintiff, and dispositions of the same. The list is categorized by race and gender. Item 29, Ex. A. Of six caucasian

Male officers disciplined for "weapons security" violations, two were reprimanded, and two were suspended without pay, one resigned, and one retired. However, out of nine African-American male officers disciplined for weapons security violations, two were reprimanded, two suspended without pay, one resigned, three were terminated, and one had charges dismissed. Because no Caucasian officers had been terminated, this fact provides an inference of discrimination, and plaintiff has made a prima facie case.

2. **Defendant's legitimate reason for termination**

The City has also met its burden in proving a legitimate reason for terminating Johnson. From the records supplied by the City, Johnson was the only officer to have had his weapon stolen twice and his vest stolen twice, and the impartial hearing officer found that represented a sufficiently unique and egregious situation to warrant termination.

In his report, the hearing officer comments on Johnson's continual lackadaisical attitude toward weapon and vest security.

"Leaving a gun in an unlocked drawer is not having it under control...This where [sic] the DEFENDANT showed a lack of understanding, poor judgment, or was careless. This is

the fourth such occasion that he has had revolvers and bullet proof vests stolen, and these have real value in the crime community he is sworn to combat. Even if the DEFENDANT misunderstood the security required for his revolver, it was clarified after he lost this same revolver the first time. He was told at a Commissioner conference in 1989 that "...a more secure locked area other than between a mattress should be found for securing his weapon."...The DEFENDANT did not learn from the 1989 one... There also was no evidence that the City was improperly enforcing these Rules & Regulations by filing these Charges against the DEFENDANT. For a police officer to lose control of their weapon once can have a detrimental effect on the rest of the Department's members and the public's loss of confidence in the Department's ability to fulfill its Public safety mission. To lose a weapon a second time, however, speaks volumes of the DEFENDANT's carelessness or casualness towards these matters.

Item 18, Ex. G, pp. 5-7.

3. **Whether discrimination played a motivating role in, or contributed to, the employer's decision**

At this stage, the burden shifts back to the plaintiff to offer proof that would allow a rational factfinder to conclude that the proffered reason was not the true reason for the adverse

employment action, and that race was. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507-08 (1993).

> Direct evidence of discrimination is not necessary, because proof is seldom available with respect to an employer's mental process. Instead, plaintiffs in discrimination suits often must rely on the cumulative weight of circumstantial evidence, since an employer who discriminates against its employee is unlikely to leave a well-marked trail...

Calrton v. Mustic Transportaion, Inc., 202 F. 3d 129, 135 (2d Cir. 2000) (citations omitted).

Plaintiff's proof on this issue is, unfortunately, nonexistent. The closest he comes to submitting proof is to make reference, by name, to officers whose weapons had been stolen and who were not terminated. Item 25, p.3, pp 5; Id., p. 9 pp 12. He does not specify the race of those officers. In addition, and more importantly, he provides no proof to support his assertions that race played a motivating role in the BPD's decision to terminate him. Throughout his papers, he maintains that records will show the truth of his allegations, but provides none of those records. See, e.g., Item

25, p. 2. He claims that the BPD's goal was to use the disciplinary incidents to bring about the termination of his employment, and that position will be substantiated by eyewitness testimony. Id., pp7-8.

However, he provides no affidavits of those eyewitnesses to raise an issue of material fact in support of his discriminatory termination claim. The bulk of the exhibits attached to his Detailed

Response, Item 26, relate to incidents dating to 1991 which are time-barred, or documents submitted concerning the disciplinary hearing before Mr. Cugalj. Mr. Johnson claims that Mr. Cugalj's report, Item 25, Ex. P1, was not impartial and was "full of opinions and slandering statements," Item 25, p.2; he contests the wording of Cugalj's report and the City's post-hearing brief, Item 25, Ex. P3; and he disputes that there was an extensive investigation into the charges that resulted in his termination. Item 25, p. 5 pp7. He asserts that there was no departmental rule or regulation as to how an officer was to store his firearm at home. Item 25, p. 5 pp4.

While Johnson may find fault with the termination procedures in his case, he provides no evidence to link those procedures with any discriminatory motivation on the part of the BPD in terminating him. The City has shown that White

officers, while not being terminated, were, disciplined for not securing their weapons and their vests. Johnson had already been admonished concerning the severity of not securing his weapon when it was stolen in 1989, Item 18, Ex. D, Charge 3, Specification 2, and was the only officer to have both his weapon and bulletproof vest stolen twice. In addition, the hearing officer found that he had been found guilty or pleaded guilty to violating Departmental regulations on nine occasions and had been given a total of 109 days in disciplinary suspension and a written reprimand. Item 18, Ex. G, p.13. he was suspended, *inter alia,* for being late to work, missing a court appearance, sleeping on duty, calling in sick, and using physical force. Item 18, Ex. H. Mr. Cugalg found that Johnson's continued casual attitude regarding

The security of his weapon and vest, coupled with his past record, were unacceptable and indicative of Johnson's unwillingness "to be guided by Departmental regulations. They form a distinct pattern, despite the progressive discipline and multiple opportunities he has been given to date... The violations...are not frivolous." Item 18, Ex. G, p. 14. Mr. Cugalj concluded that, coupled with his record, Johnson's latest security violations were "detrimental to the

efficiency and morale of the Department, his fellow officers and negatively impacts on the public he is supposed to serve," and warrants his termination. Id., p. 14.

Plaintiff has anchored his case on unsubstantiated allegations, conclusory assertions, and mere denials of the adverse party's pleading, and has not set forth and established specific facts showing that there is a genuine issue of fact for trial. Because he has not met his burden of proof to ultimately show that discrimination played a role in, or contributed to, the employer's decision to terminate him, defendant's motion for summary judgment is hereby granted.

CONCLUSION

For the reasons set forth above, defendant's motion for summary judgment, Item 18, is hereby granted, and plaintiff's complaint is dismissed.

So ordered.

Dated: July 9, 2001

"S/John T. Curtin"

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THEFEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 6th day of September, two thousand.

PRESENT:
Hon. Thomas J. Meskill,
Hon. Richard J. Cardamone,
Hon. Chester J. Straub,
Circuit Judges.

United States Court of Appeals, Second Circuit
Filed Sep. 6 2002
Rosann B. Mackechinie, Clerk

Curtis K. Johnson,
Plaintiff-Appellant,
v.
Buffalo Police Department,
Defendant-Appelle

SUMMARY ORDER
No. 02-7105

Appearing for Plaintiff-Appellant: Curtis K. Johnson, pro se, Buffalo, NY.
Appearing for Defendant- Appelles: Michael B. Risman, Corporation Counsel for City of Buffalo, Buffalo, NY .

Appeal from the United States District Court for the Western District of New York (John T. Curtin, Judge).

AFTER ARGIMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby **AFFIRMED.**

Plaintiff-Appellant Curtis K. Johnson, pro se, appeals from a judgment of the United States District Court for the Western District of New York (John T. Curtin, Judge) granting the motion by Defendant-Appellee Buffalo Police Department ("Buffalo P.D.") for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. We affirm.

I.

In August 1998, Johnson filed a complaint under Title VII of the Civil Rights Acts of 1964, 42 U.S.C.** 2000e et seq. ("Title VII"), alleging that he suffered various acts of discrimination during the course of his seven-years' employment as a police officer with the Buffalo P.D. Johnson claimed that because he was African-American, he was at various times given the least desirable assignments, subjected to discipline disproportionate to that which was imposed on similarly situated white officers, exposed to "white supremacist literature," and targeted with racial epithets. Johnson further alleged that his termination on March 17, 1995, was based impermissibly on his race.

The Buffalo P.D. moved for summary judgment, and the District Court granted the motion in July 2001 on the grounds that: (1) all of Johnson's discrimination claims, other than his termination claim, were time-barred because Johnson failed to file an agency charge within 300 days of those alleged incidents; (2) the continuing violations doctrine did not excuse the time-bar as Johnson failed to allege an ongoing discriminatory policy and as the various incidents were discontinuous; and (3) although Johnson was able to establish a prima facie case of employment discrimination, he provided no evidence that the Buffalo P.D.'s proffered reason for

terminating him-his history of disciplinary infractions-was pretextual.

We review the District Court's grant of summary judgment de novo. Allstate Ins. Co. v. Mazzola, 175 F.3d 255, 258 (2d Cir. 1999). In addition, pro se submissions are construed liberally and are treated as raising the strongest arguments that they might suggest. Graham v. Henderson, 89 F.3d 75, 79 (2d Cir. 1996).

II.

When a party moves for summary judgment against a pro se litigant, we require that either the movant or the district court provide the pro se litigant with notice of the consequences of failing to respond to the motion. Vital v. Interfaith Med. Ctr., 168 F.3d 615, 620 (2d Cir. 1999). Lack of such notice will result in a reversal of summary judgment. Id. At 620. On the other hand, when, it is "reasonably apparent that the litigant understood the nature of the adversary's summary judgment motion and the consequences of not properly opposing it," the failure to provide notice will be deemed harmless. Sawyer v. Am. Fed'n of Gov't Employees, 180 F.3d 31, 35 (2d Cir. 1999).

Neither the Buffalo P>D. nor the District Court gave Johnson the requisite notice under Vital. It nonetheless appears that Johnson sufficiently understood the consequences of not responding to the motion. First, Johnson filed two detailed submissions in opposition to summary judgment, including over 100 pages of exhibits. Second, Johnson used his submissions to counter the Buffalo P.D.'s arguments and exhibits, in line-by-line fashion, and he further argued that a trial ultimately was necessary to prove the "real" facts as opposed to the facts according to the Buffalo P.D. See Cucco v. Moritsugu, 222 F.3d 99, 112 (2d Cir. 2000) (summary judgment was appropriate when the pro se litigant

filed a 17-page detailed affirmation of her version of the facts); Sawyer, 180 F.3d at 36 (pro se litigant understood consequences when the litigant submitted a "summary" containing conclusory allegations of a conspiracy against him and other documents in an attempt to prove such conspiracy, and his papers stated that he "looked forward to trial"); M.B. #11072-054 v. Reish, 119 F.3d 230, 232 (2d Cir. 1997) (no reversal required where the pro se litigant's submissions included a 27-page declaration of facts with 104 pages of exhibits, a 40-page memorandum of law, a counterstatement of disputed facts, a cross-motion for summary judgment, and a request for further discovery).

III.

Title VII requires an aggrieved party to file a charge of discrimination with either the Equal Employment Opportunity Commission or New York State Division of Human Rights ("NYSDHR") within 300 days of the alleged act of discrimination; the failure to do so will result in the claims being time-barred. 42 U.S.C. * 2000e-5(e) (1); Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 712 (2d Cir. 1996). Johnson filed his charge with the NYSDHR on June 9, 1995. The only incident of alleged discrimination that occurred within 300 days of that date was Johnson's termination on March 17, 1995. Accordingly, the only timely claim is the one for discriminatory termination.

The continuing violations doctrine does not extend the filing period in this case. We have previously applied the

continuing violations doctrine so that if a plaintiff files a timely agency charge about a particular discriminatory act committed in furtherance of an "ongoing policy of discrimination," the statute of limitations is extended "for all claims of discriminatory acts committed under that policy." See Weeks v. N.Y. State Div. Of Parole, 273 F.ed 76, 82 (2d Cir. 2001). It appears, however, that the Supreme Court has foreclosed use of the continuing violations doctrine in this context. See Nat'l R.R. Passenger Corp. v. Morgan,_U.S._, 122 S. Ct. 2061, 2069-73 (2002); see also Bauer v. Bd. of Supervisors, 2002 WL 182238, * 3 (9th Cir. May 14, 2002) (After Morgan, "the continuing violations doctrine may not be applied to incorporate untimely claims for discrete discriminatory acts even though they may be related to a timely claim."). In any event, even in the absence of Morgan, the continuing violations doctrine discontinuous in time with one another and with the sole timely act alleged-i.e., his termination. See Quinn v. Green Tree Credit Corp., 159 F.3d 759, 766 (2d Cir. 1988).

IV.

In response to Johnson's prima facie case of discrimination, the Buffalo P.D. offered a legitimate, non-discriminatory reason for its decision to terminate Johnson:

He had been disciplined repeatedly for violating department regulations, including tardiness, missed court appearances, sleeping on duty, returning late from lunch, use of excessive physical force, excessive "calling in ick," failure to appear at a police commissioner conference, being late for a police commissioner conference, losing a bulletproof vest (twice), and allowing his service revolver to be stolen after carelessly leaving the gun in an unsecured Area of his residence (twice). By 1993, Johnson's disciplinary violations had earned him a total of 109 days of suspension.

Our review of the record leads us to agree with the District Court that, other than unsubstantiated allegations and conclusory assertions, Johnson failed to set forth sufficient evidence to suggest that the reason for termination proffered by the Buffalo P.D. was pretextual. Accordingly, the motion for summary judgment was properly granted. See Viola v. Philips Med. Sys. of N. Am., 42 F.3d 712, 717 (2d Cir. 1994) ("[t]o defeat a properly supported motion for summary judgment, plaintiff must produce sufficient evidence to support a rational finding that the legitimate, nondiscriminatory reasons proffered by the employer were false") (internal quotation marks and citation omitted); Morris v. Lindau, 196 F.3d 102, 109 (2d Cir. 1999) (the non-moving

party may not rely simply on conclusory allegations or speculation to avoid summary judgment, but instead must offer evidence to show that "its version of the events is not wholly fanciful").

V.

For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT:

ROSEANN B. MACKECHNIE, CLERK

"s/Lucille Carr" 9/6/02

BY DATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007
Rosann B. Mackechnie, Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of January, two thousand three.

Present:

Hon. Thomas J. Meskill,
Hon. Richard J. Cardamone,
Hon. Chester J. Straub,
Circuit Judges

United States Court of Appeals, Second Circuit Filed Jan 14, 2003
Rosann B. Mackechinie, Clerk

Curtis K. Johnson,
Plaintiff-Appellant,
v.
Buffalo Police Department,
Defendant-Appelle

Docket #
No. 02-7105

A petition for panel rehearing having been filed herein by Curtis K. Johnson, upon consideration thereof, it is ordered that said petition be and it hereby is DENIED.

For the Court
Rosann B. Mackechnie, Clerk
"s/Arthur Heller"
Motions Staff Attorney

Jan 14 2003